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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 634

A. MASCHMEIJER JR., INC.,
Petitioner,

v.

EASTERN MOTOR EXPRESS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPORTING BRIEF OF THE MANUFACTURING CHEMISTS' ASSOCIATION, INC., AMICUS CURIAE

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The Interest Of The Manufacturing Chemists' Association, Inc., As An Amicus Curiae

The interest of the Association is in the correct determination of the respective rights and liabilities of the shippers of freight in interstate commerce and of the common carriers employed to transport such freight, when there is a claim for loss or damage to the goods entailing a question of fact as to the existence of a latent defect in the container of the freight.

The Association is a non-profit corporation, with offices located at 1625 Eye Street, N. W., Washington, D. C. Its members ship more than 90 percent of all chemical

traffic moving in interstate commerce. They operate numerous plants and warehouses located throughout the country and daily make numerous shipments of freight by common carriers in interstate commerce, including many shipments packaged in new and used barrels and drums.

The case arose in an action for damages by the respondent common carrier by motor vehicle against the petitioning shipper. The damages were alleged to have resulted from the leakage of two drums of a liquid chemical, methyl phenyl acetate, which constituted a part of an interstate shipment of thirty drums. Evidence was offered before the trial court that the two drums contained latent defects which could not be ascertained by any practicable method prior to shipment. Respondent sought to attribute the damage to the existence of such latent defects. After trial without a jury, the trial judge granted motions to dismiss the complaint, 141 F. Supp. 477.

On appeal, the court below reversed, 247 F. 2d 826, holding that under the common law:

> . . . a shipper in delivering packaged goods for shipment impliedly warrants that the containers, if not patently inadequate, are fit for the contemplated shipment. * * * the degree of care exercised by the defendant is irrelevant, for the duty of the defendant as bailor-warrantor is absolute.

The Association earnestly supports the various contentions made in the petition for certiorari. As stated in the motion for leave to file this brief, however, the purpose of the brief is not to argue those questions, but to bring out with particularity the nature and extent of the conflicts between the decision in the court below, and a decision of the Court of Appeals for the Third Circuit on the same matter.

ARGUMENT.

The decision in the court below is in conflict with the decision of the Court of Appeals for the Third Circuit in Commodity Credit Corp. v. Norton, 167 F. 2d 161, (1948).

Community Credit Corporation v. *Norton*, 167 F. 2d 141, 3rd Circuit, 1948, involved an action by a shipper to recover against a rail carrier for loss of castor seed oil which, while in transit, had leaked out of recoopered and second-hand barrels. The appeal turned upon the same questions here presented, *i.e.*, the duties and liabilities of carrier and shipper where loss in transit is allegedly occasioned by a latent defect in the container. The lower Court had entered judgment on a jury verdict against the plaintiff and the question was:

> . . . whether the trial judge erred in his charge to the jury on the nature and extent of the liability of the defendant. (page 162)

It was held that the trial judge did so err and in the accompanying analysis four principles directly pertinent to the issues herein were enunciated.

The first principle is that a mere finding of "no observable defect" in a container when tendered to the carrier does not absolve the carrier of an insurer's liability. The trial court had charged the jury as follows:

> *If you find that there was the ordinary, acceptable handling in the shipment in the transfers of these various railroads, and if you find that there was no observable defect, then you will apply to those facts, if you so determine, the rule which I have outlined, and there would seem to the Court to be no legal responsibility on the part of the defendant company.* (163) (Italics as in report)

Speaking of this charge, the Circuit Court stated as follows:

> The error in the charge, we think, is brought into sharp relief by the italics. The learned trial judge instructed the jury that "rough handling" or "ordinary acceptable handling" would make a difference in the result of the case where there was "no observable defect" in the shipment upon receipt by the carrier. That is not the law. (page 164)

What the Third Circuit states is "not the law" in the *Norton* case, the Second Circuit in this case holds to be the law, as seen from the following excerpt from the holding of the court below:

> . . . a shipper in delivering packaged goods for shipment impliedly warrants [absolutely] that the containers, if *not patently inadequate*, are fit for the contemplated shipment. (Emphasis added)

The italicized words are the equivalent of "no observable defect", and the "absolute warranty", according to the court below, renders the shipper liable subject *only* to the qualification that the container is "not patently inadequate".

The second principle of the *Norton* case is related to the first. It is that only an affirmative finding that a latent defect existed can operate to diminish a carrier's liability from insurer to that of mere responsibility for negligence. Speaking of that portion of the trial court's charge to the jury quoted in italics above, the Circuit Court in the *Norton* case stated:

> As the cases already cited plainly establish, the carrier is responsible without regard to the exercise of due care, even though the damage or loss be occasioned by the independent act of third persons. See *United States* v. *Morgan*, 1850, 11 How. 154, 162, 52 U.S. 154, 162, 13 L. Ed. 643. The manner of handling the cargo, therefore, would be entirely irrelevant except in the event of an affirmative finding by the jury of the existence of a latent defect . . . (pages 164-165)

The decision of the trial court in the instant case may be searched in vain for such an affirmative finding. The position of the court below as to this matter is best revealed in the following passage:

> In this case, the undisputed facts imperatively required a finding that the defendant had breached an implied warranty . . .

The only facts which properly could be called "undisputed" are (1) that the drums did fracture, and (2) that the contents did leak. The court below expressly disagreed with the trial court's finding that no warranty existed to provide a drum that "shall *never* leak". The holding of the court below is that an absolute warranty exists which is violated *per se* by the fact of leakage, whether or not an affirmative finding of the existence of a latent defect is possible.

The third principle for which the *Norton* case stands was not stated in such direct terms as the first two but is of special importance here insofar as it is flatly contradicted by the holding of the court below. The rule is that a latent defect, where affirmatively found, must be shown to have "caused the loss" complained of in order to relieve the carrier of an insurer's liability. The Circuit Court in the *Norton* case found as follows:

> . . . the learned trial judge properly stated what the general liability of the defendant is. However, we believe that the quoted portion of the charge manifests error in the *application* of the basic principles announced.
>
> The error in the charge, we think, is brought into sharp relief by the italics. (page 164, emphasis supplied)

The error in "application" indicated by the portion of the trial judge's charge italicized in the report (page 163) has already been quoted and discussed above. The portion of

the trial judge's charge held by the Circuit Court to have "properly stated what the general liability of the defendant is" is reported by the Circuit Court as follows:

> Early in the charge, the jury was instructed that a common carrier is an insurer "except in such a case where, as asserted here, the goods were shipped in containers which seemed to be, to reasonable observation proper, but which contained defects which were not observable, latent defects, *which defects caused the loss.*" (page 163, emphasis supplied)

The holding of the court below in the instant case is plainly contrary to this statement of the law. The court below found that there is an implied warranty by the shipper that containers for packaged goods delivered to a common carrier are:

> . . . fit for the use for which the bailment is made at least as against latent unfitness. . . .

and that:

> . . . the duty of the defendant, as bailor-warrantor is absolute.

In that view of the matter, any latent defect found to exist in the container necessarily results in judgment against the shipper whether or not there is a finding that the latent defect proximately caused the loss or damage.

That the third principle of the *Norton* case is irreconcilably in conflict with the holding of the court below is easily demonstrated:

Assume that a latent defect is found to exist in a freight container at a point thereon which fractured while the container was in the course of transportation; and further, that there is convincing evidence that a common carrier employee dropped that same container some five feet off the tail gate of a truck, and that the fracture in the container occurred at the point of impact. Clearly the *Norton*

case rule is that the negligent handling of the container not the latent defect "caused the loss" and the carrier is, therefore, liable as an insurer. Under the decision of the court below, however, the shipper would be held liable for the breach of an absolute implied warranty that the container was not subject to any latent unfitness. The Association urges that the law on this subject as set forth in the *Norton* opinion of the Third Circuit is sound, and that the contrary opinion of the court below is erroneous.

It should be noted further that there was no finding of fact before the court below that any latent unfitness "caused the loss". Instead, the trial judge, sitting without a jury, found that "there was no proof that the drums were in need of repair or weakened or otherwise deteriorated prior to shipment;" and that "aside from the specifications, [previously discussed in his opinion] plaintiff has made no case for recovery against defendant on any theory of negligence."

The fourth principle for which the *Norton* case stands is that even where a latent defect is affirmatively found to exist, the carrier is nonetheless held to the standard of ordinary care and is liable for its negligent acts. This is made plain from the following passage in the *Norton* case:

> The manner of handling the cargo, therefore, would be entirely irrelevant except in the event of an affirmative finding by the jury of the existence of a latent defect, or unless the damage or loss is brought within another excepted peril, which would give rise to the application of the rule of negligence.

Stated in other words, the carrier's "manner of handling the cargo" *is* relevant where a latent defect is affirmatively shown to have existed. In that circumstance, the Court in the *Norton* case holds that the carrier's liability is reduced to responsibility for negligent conduct.

Under the conclusion of the court below, any "application of the rule of negligence" would be precluded, where the existence of a latent defect in a container is found to be an "excepted peril". That is to say, the rule of the case below is, in effect, that the shipper impliedly warrants absolutely against any latent unfitness of the container and that evidence of negligence of either shipper or carrier would be irrelevant in the determination of the case. That rule is in conflict with the rule of the *Norton* case. Compare *McNeil Higgins Co.* v. *Old Dominion S.S. Co.*, 235 Fed. 854 (7th Cir., 1916) and *Chicago & E. I. R. Co.* v. *Collins Produce Co.*, 235 Fed. 857, (7th Cir., 1916); aff'd 249 U.S. 186).

CONCLUSION.

Based upon the foregoing, the Association prays that the Court grant the petition for writ of certiorari to review the decision of the court below.

Respectfully submitted,

NUEL D. BELNAP
KENNETH J. MCAULIFFE
Amicus Curiae

December, 1957

Certificate of Service.

I, Nuel D. Belnap, attorney for The Manufacturing Chemists' Association, Inc., and member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of December, 1957, I served copies of the foregoing document upon the several parties hereto, as follows:

1. On the Eastern Motor Express, Inc., by mailing a copy with air-mail postage prepaid to Bernard Axler, (Zelby & Burstein) 135 Broadway, New York, N. Y.

2. On A. Maschmeijer Jr., Inc., by mailing a copy with air-mail postage prepaid to Jerome G. Greenspan, 169 William Street, New York, N. Y.

3. On The National Barrel & Drum Association, Inc., by mailing a copy with air-mail postage prepaid to Morris Hershson, 200 West 57th Street, New York, N. Y.

/s/ NUEL D. BELNAP